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Nos. 06-340 and 06-549

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In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE *AMICUS*

Amicus curiae the National Association of Clean Water Agencies ("NACWA") represents the nation's publicly-owned wastewater treatment works ("POTW") agencies. NACWA's nearly 300 member agencies collect, treat and reclaim over 18 billion gallons per day of wastewater to provide most of the U.S. population with reliable sewer service. NACWA members are directly affected by regulatory decisions made under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA"). These members operate their POTWs pursuant to National Pollution Discharge Elimination System ("NPDES") permits, most of which were issued by states approved by the United States Environmental Protection Agency ("EPA") pursuant to Section 402(b) of the CWA. NACWA's members exist to provide effective wastewater treatment and to promote water quality. They are committed to protecting the integrity of the CWA. NACWA's interest in this case is in avoiding the improper extension of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* ("ESA") to impede administration of the CWA. It takes no position on any other aspect of EPA's approval of Arizona's NPDES program, including the

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[1] Pursuant to Rule 37.6 of this Court, *Amicus* represent that counsel for *Amicus* authored this brief in its entirety and that no person or entity other than *Amicus* and their representatives made any monetary contribution to the preparation or submission of this brief.

additional question on which the Court requested briefing by the parties.[2]

STATEMENT OF THE CASE

NACWA adopts the statement of the case contained in the United States Environmental Protection Agency's *Petition for Writ of Certiorari* ("EPA Petition") filed in this proceeding, except insofar as the EPA Petition suggests that EPA transfers NPDES permit authority to a State. Rather than a transfer by EPA, *see* EPA Pet. For Cert. at 2-8, CWA Section 402(b) provides for assumption of that authority by the States.

SUMMARY OF ARGUMENT

The plain text of Section 402(b), as well as the structure of the CWA as a whole and its legislative history, demonstrates that: (1) EPA may consider only the factors listed in Section 402(b) when it decides whether to approve a State's NPDES program; and (2) only if EPA determines that a proposed State NPDES program does not meet the statutory requirements may the Agency disapprove the program, regardless of the requirements of other Federal statutes. Furthermore, EPA's own regulations make it clear that the ESA has no role in its review of State NPDES programs submitted for approval. EPA would have avoided much confusion in this case if it had heeded the statute and its own regulations.

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[2] Each of the parties to this case has previously filed its consent to NACWA's filing of this brief, with the exception of the Solicitor General. NACWA is filing the Solicitor General's consent with this brief.

ARGUMENT

I. CONGRESS HAS DIRECTLY SPOKEN TO APPROVAL CRITERIA FOR STATE NPDES PROGRAMS

In the Federal Water Pollution Control Act Amendments of 1972, which first enacted Section 402, Congress demanded swift action to improve and protect the Nation's waters. Pub. L. No. 92-500, 86 Stat. 816 (1972). It prescribed a new federal-state relationship to achieve this objective, and it set forth the terms on which that relationship would proceed. EPA's ultimate conclusion that potential ESA effects were not germane to its evaluation of the Arizona NPDES program is consistent with Congress's intent embodied in the plain language of Section 402(b), as well as the structure of the CWA as a whole, and its legislative history. As this Court has instructed:

> If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n.9 (1984) ("*Chevron*"). The decision by the court below, *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), forgot this principle.

A. CWA SECTION 402(B) LIMITS EPA'S DISCRETION TO DISAPPROVE STATE NPDES PROGRAMS

Both the text of the CWA and its legislative history reflect Congress's determination to restore and maintain the

"chemical, physical and biological integrity of the Nation's Waters" as quickly as possible. 33 U.S.C. § 1251(a). To that end, it provided for a Federal-State partnership, in which the States would operate EPA-approved NPDES permit programs. CWA Section 402(b) instructs the EPA Administrator to approve each State program submitted, unless he determines that it is deficient on specific grounds:

> The Administrator *shall approve* each submitted program unless he determines that adequate [State] authority does not exist . . ..

33 U.S.C. § 1342(b) (emphasis added). The Act then goes on to list precise and exclusive criteria that constitute "adequate authority." They are limited to nine essential elements of sufficient permit program powers: the power to issue revocable permits for five-year terms, *id.* § 402(b)(1); to apply effluent limitations and related water quality requirements in those permits, *id.*; to enter and inspect regulated premises, *id.* § 402(b)(2)(B) ; to give notice of applications to the public, affected states and the Administrator, *id.* §§ 402(b)(3), (4), (5); to enforce compliance and assess penalties for violation, *id.* § 402(b)(7); and the power to impose pretreatment requirements on POTWs, *id.* §§ 402(b)(8), (9). There is no criterion relating to the power of the State to advance other cherished Federal policies and programs, such as the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*; the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq.* ("NEPA"); the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*; the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*; or, for that matter, the ESA. While the 1973 ESA was not yet adopted when Section 402(b) was first enacted, Congress has since amended the CWA no fewer than nine times, *see* 33 U.S.C. § 1251 note (2000 & Supp. IV 2004), and it has never seen fit to add any reference to the

ESA in Section 402(b). As the Fifth Circuit recognized almost a decade ago:

> There is no hint that Congress intended to grant EPA authority to erect additional hurdles to the permitting process beyond those expressly noted in [Section 402(b)].

American Forest & Paper Ass'n v. EPA, 137 F.3d 291, 298 (5th Cir. 1998). To the contrary, EPA's addition of extraneous criteria to those set by Congress would have threatened the congressional goal of implementation of the NPDES program without interference.

B. Congress Demanded Implementation Without Interference

Congress included several provisions in the CWA to ensure that its "restore and maintain" goals could be achieved efficiently and swiftly. It set tight timetables for EPA to issue regulations prescribing effluent limitations and standards, *see, e.g.*, CWA §§ 304(b), 306, 33 U.S.C. §§ 1314(b), 1316, and it provided for prompt and preclusive judicial review of those regulations in Section 509(b). 33 U.S.C. § 1369(b). As the First Circuit noted in *Narragansett Electric Co. v. EPA*;

> The short time frame in § 1369(b) clearly reflects some effort to protect EPA's interests in finality in certain matters . . ..

407 F.3d 1, 5 (1st Cir. 2005).

Congress also contemplated that EPA would complete its review of state NPDES programs submitted for approval within 90 days. CWA Section 402(c) requires the EPA Administrator to suspend the issuance of Federal NPDES

permits within 90 days of the date that a State submits a complete NPDES program for approval, unless he finds that the state's submission does not meet the criteria of Section 402(b). CWA § 402(c), 33 U.S.C. § 1342(c). Without an EPA decision within that ninety-day review window, Section 402(c) would have left the role of permit issuer vacant. In the absence of a decision, EPA's authority would have been suspended by operation of the statute, and the State's would still be inchoate pending approval.[3]

Similarly, most of the actions taken by EPA pursuant to its CWA authority were exempt from the requirements of the NEPA by CWA Section 511(c). 33 U.S.C. § 1371(c). As the bill's principal sponsor explained during Senate consideration of the Conference Report:

> The purpose of [the Clean Water Act] is to set rapidly in motion an effective water pollution control program. The Act sets tight time limits within which the Administrator must take a multitude of actions, each heavily dependent on the other, that will, in the aggregate, produce a meaningful, effective, and truly workable program as quickly as possible. *Should the Administrator find himself confronted with substantive or procedural requirements extraneous to this Act, the very program that the Act seeks to establish would be imperiled.*

Congressional Research Service, 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, No. 93-1, at 182 (1973) (extended remarks of Sen. Muskie regarding consideration of the Conference Report) (emphasis added) [hereinafter 1972 FWPCA

[3] EPA's implementing regulations at 40 C.F.R. § 123.1(d) make the suspension effective only upon its approval of a State program, rather than within ninety days of the State's submission.

Legis. Hist.]. Indeed, Congress specifically intended that EPA's actions under the CWA would proceed swiftly, and without interference from other federal programs, in order to ensure meaningful progress against water pollution.

C. CONGRESS CHOSE TO GIVE THE STATES THE PRIMARY ROLE IN THE NPDES PERMIT PROGRAM

To achieve the goals of the CWA, Congress chose to give the States primary responsibility for the NPDES program. The text of CWA Section 101(b) declares the policy of Congress with respect to the role of the States:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution . . .. It is the policy of Congress that the *States* . . . implement the permit programs under [Section 402].

33 U.S.C. § 1251(b) (emphasis added). The standards Congress set for the States to assume that responsibility have remained largely unchanged for the past 35 years.

It was necessary to enlist the resources of the States to meet the "tight time limits" to which Sen. Muskie referred, especially to complete issuance of NPDES permits. These permits were the key to apply effluent limitations to point sources, and Congress expected them to be issued for up to an estimated 300,000 industrial point sources and an untold number of other discharges by December 31, 1974, a bare 26 months after enactment. *Compare* 2 1972 FWPCA Legis. Hist. at 1257 (statement of Sen. Muskie regarding S. 2770) *with* 33 U.S.C. §§ 1342(k) & 1371(b). It gave point sources a permit grace period until that time, provided they had

applied for an NPDES permit. *See* CWA 402(k), 33 U.S.C. § 1342(k). Congress knew that such a monumental task of implementation demanded the active participation and involvement of the States. *See, e.g.*, S. Rep. No. 92-414, at 71 (1971) (regarding S. 2770), *reprinted in* 1 1972 FWPCA Legis. Hist. at 1489. ("It is expected that the States will play a major role in the administration of this program."); *id.* at 72, 1490 ("A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program."); H.R. Rep. No. 92-911, at 127 (1972), *reprinted in* 1 1972 FWPCA Legis. Hist. at 814 ("The states . . . stressed the need to put the maximum responsibility for the permit program in the states. . . . [T]he states ought to have the opportunity to assume the responsibilities that they have requested.").

Congress was aware that its preference for state implementation meant that the panoply of Federal laws, Executive Orders, and regulations that might apply to Federal issuance of permits would not apply to the State programs. Perhaps Congress preferred to give the States the flexibility, within prescribed bounds, to experiment, to innovate, to pursue the diversity that is the hallmark of our federal system. To that end, for instance, it specifically preserved the authority of the states to adopt and enforce standards and requirements more stringent than required under the Federal Act. *See* CWA § 510, 33 U.S.C. § 1370; *see also* CWA §§ 401(a), (d), 33 U.S.C. § 1341(a), (d) (providing a means for states to impose "any other appropriate requirement of State law" as conditions in federal permits and licenses). *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711 (1994). And at no point has it sought to encumber – or to allow EPA to encumber – the Section 402(b) approval process with any concerns extraneous to the CWA.

The flexibility to forge creative approaches has also fostered innovative local programs to protect endangered species. For instance, the Sonoran Desert Conservation Plan – a joint effort of Pima County, Arizona, the U.S. Fish and Wildlife Service, and the State of Arizona – is one of the nation's most comprehensive conservation and urban planning efforts. It provides short-term actions and long-term strategies to protect endangered species and their habitats in this rapidly growing portion of the State. As part of this effort, Pima County voters approved a $174.3 million bond issue to acquire and protect critical habitats, and roughly 77,000 acres have been placed in protective reserves.[4] Similarly, the King County, Washington Wastewater Treatment Division and the San Francisco Public Utilities Commission have begun their own Habitat Conservation Planning studies and processes.[5] In Florida, Collier County also recently initiated a Habitat Conservation Plan that manages growth to protect endangered species, especially the Red-Cockaded Woodpecker, and Broward County sponsors the NatureScape Broward program to encourage native drought-tolerant landscape designs that conserve water, protect water quality, and create and preserve wildlife habitat.[6] These programs illustrate steps local government are taking as part of their commitments to environmental stewardship.

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[4] *See generally* Pima County Board of Supervisors, Pima County Multi-Species Conservation Plan (2006); *See* Pima County Board of Supervisors, Sonoran Desert Conservation Plan Update (2006).

[5] *See* King County Wastewater Treatment Division, *Habitat Conservation Plan*, at http://dnr.metrokc.gov/wtd/hcp/index.htm (Aug. 23, 2006); San Francisco Public Utilities Commission, Res. No. 00-0229.

[6] *See* Collier County, Florida, Res. Nos. 2005-174 & 2006-41; Broward County, Florida, NatureScape Broward – Between Sawgrass and Seagrass, at http://www.broward.org/naturescape/ (last visited Feb. 19, 2007).

II. BOTH NPDES AND ESA REGULATIONS PRECLUDED EPA FROM CONSIDERING THE ESA

A. EPA'S NPDES RULES PREVENT THE AGENCY FROM INJECTING ESA CONCERNS INTO CWA SECTION 402(B) APPROVALS

EPA's regulations regarding the required content of state NPDES programs allow the Agency to consider only the criteria contained in CWA Section 402(b) when evaluating requests to approve such programs. *Compare* 33 U.S.C. § 1342(b) *with* 40 C.F.R. § 122.49 & 40 C.F.R. § 123.25. It is a fundamental rule of administrative law that an agency must abide by its own regulations. *See Fort Stewart Schools v. FLRA*, 495 U.S. 641, 654 (1990); *accord, United States v. Nixon*, 418 U.S. 683, 696 (1974) (stating so long as a regulation remains in force, the Executive Branch is bound by it). The Second Circuit has recently invoked this principle in reviewing another aspect of EPA's NPDES program. See *RiverKeeper, Inc. v. EPA*, No. 04-6692-(ag)(L), slip op. at 55 (2d Cir. Jan. 25, 2007), *available at* 2007 WL 184658 (2d Cir. 2007) ("It is axiomatic that an administrative agency is bound by its own regulations") (internal citation omitted). EPA would have been wise to have heeded that axiom here. Because it did not, a refresher on those regulations is in order.

EPA's interim NPDES permit program under Section 402(a), 33 U.S.C. § 1342(a), is governed by its regulations at 40 C.F.R. Part 122. Other federal laws that may be applicable to permit-issuance decisions by EPA as a federal

agency are listed in Section 122.49. These include laws relating to protection of scenic rivers, historical values, endangered species, and the coastal zone; to consultation with state wildlife resource agencies; and in certain instances to broad consideration of environmental impacts. *See id.* It is here in Section 122.49 that EPA's regulations make the ESA specifically applicable to EPA decisions on permits. *Id.* § 122.49(c).

EPA regulations at 40 C.F.R. Part 123 in turn set forth the requirements State programs must meet to obtain approval. As EPA explains there:

> This part specifies the procedures EPA will follow in approving, revising and withdrawing State programs and the requirements State programs must meet to be approved by the Administrator under sections 318 [aquaculture], 402, and 405(a) [sludge disposal] (National Pollutant Discharge Elimination System–NPDES) of the CWA.

40 C.F.R. § 123.1(a). EPA then commits itself to approve those State programs that meet the requirements of Part 123:

> The Administrator will approve State programs which conform to the applicable requirements of this part.

Id. § 123.1(c). The rule then specifies the applicable requirements, in pertinent part, by incorporating selected portions of those applicable to EPA's own permit program, as set forth in various sections of Part 122. When EPA then sets forth more specifically in 40 C.F.R. § 123.25(a) the catalogue of mandatory program elements that States must incorporate to gain approval, it omits entirely any reference to Section 122.49 or the Endangered Species Act. *See* 40

C.F.R. § 123.25(a). This omission is consistent with the statute.

In addition, a comparison of the text of 40 C.F.R. § 122.49 as originally proposed, versus its final form, evinces EPA's recognition that the requirements of other federal environmental statutes are not appropriate grounds for NPDES permit requirements under the CWA. As proposed, Section 122.49 would have required all NPDES permits to reflect applicable requirements from other federal environmental laws. *See* 43 Fed. Reg. 37,078, 37,102 (Aug. 21, 1978). The final version of this provision, however, deleted the requirement for NPDES permits to include such obligations. *See* 40 C.F.R. § 122.49. Instead, even where EPA is the permit agency, Section 122.49 stands only as a reminder of the other Federal statutes that may be independently applicable to the same activity being permitted.

The NPDES rule's omission of the ESA from State program requirements is consistent with a joint discussion by EPA, FWS, and NMFS of the Fifth Circuit's opinion in *American Forest & Paper Ass'n v. EPA*. In the preamble to their final 2001 Memorandum of Agreement (the "MOA"), those agencies agreed that the MOA would not impermissibly interpose ESA requirements into EPA's CWA analyses because EPA's consultation with FWS and NMFS "simply ensures that EPA has the full benefit of the Services' views on potential impacts to Federally listed species . . . *in determining whether CWA requirements are met.*" 66 Fed. Reg. 11,202, 11,206 (Feb. 22, 2001) (emphasis added). And it is the CWA requirements, not those of the ESA, that govern EPA's decision under its own binding NPDES regulations.

Limiting EPA's analysis of State NPDES programs submitted for approval to the four corners of CWA Section

402(b) and its implementing regulations provides the Agency with definite rules of decision to use while implementing the Act. Perhaps more importantly, faithful adherence to the statute and EPA's implementing regulations provides States seeking to operate their own NPDES program with certainty as to the requirements for such a program.

B. ESA Regulations Instructed EPA Not To Consider the ESA

EPA would also have been well-advised to follow the ESA regulations reflecting the interpretation of the ESA by the agencies charged with its implementation. As explained in the EPA Petition and that of the National Association of Home Builders, the regulations promulgated by the agencies charged with administering the ESA provide that:

> Section 7 [of the ESA] and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.

50 C.F.R. § 402.03 (emphasis added); EPA Pet. For Cert. at 18; National Association of Home Builders Pet. for Cert. at 20-21. Thus, where a Federal agency has no discretion regarding a particular action, FWS and NMFS have concluded that Section 7 and the related regulations do not apply. As the EPA Petition points out, any ESA consequence of Arizona's assumption of NPDES authority was the effect of congressional mandate, not of Agency action. EPA Pet. for Cert. at 17. Under the ESA regulation, any such effect was not "caused" by EPA's approval. *Id.*; *see* 50 C.F.R. § 402.02. EPA had no choice but to approve. Because FWS and NMFS's interpretation is a permissible reading of ESA Section 7(a), 16 U.S.C. § 1536(a), it is entitled to *Chevron* deference. *See* 467 U.S. at 842-43.

CONCLUSION

For the foregoing reasons, NACWA urges the Court to vacate the decision of the United States Court of Appeals for the Ninth Circuit with respect to the necessity for EPA to consider ESA effects in CWA § 402(b) decisions.

Respectfully submitted,

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STATUTORY APPENDIX

CWA Section 402(c), 33 U.S.C. § 1342(c)
(2000 & Supp. IV 2004).

(c) **Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator**

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals.--A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.